In the

Supreme

THE NORTHERN

WILLIAM T. [illegible], [illegible] OF
[illegible] COUNTY, MONTANA,

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF
APPEALS FOR THE NINTH CIRCUIT.

# BRIEF FOR APPELLANT.

C. W. BUNN,
of Counsel.

Argus Printing Company, Book and Job Printers,
First Union Block, St. Paul.

# SUPREME COURT OF THE UNITED STATES

## OCTOBER TERM, 1898.

---

THE NORTHERN PACIFIC RAILWAY COMPANY,
*Appellant,*

vs.

WILLIAM V. MYERS, TREASURER OF JEFFERSON COUNTY, MONTANA.

---

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

---

# BRIEF FOR APPELLANT.

---

### STATEMENT.

This suit involves the validity of a tax levied under the laws of the State of Montana against unpatented place lands lying within the grant to the Northern Pacific Railroad Company made by the Act of Congress approved July 2, 1864.

The case comes to this court on appeal from the decree of the Circuit Court of Appeals of the Ninth Circuit. The appellant, Northern Pacific *Railway* Company, being a corporation organized under the laws of Wisconsin and not a federal corporation, the ground on which rests the jurisdiction of this court should be explained.

The suit was brought in the Circuit Court of the United States for the District of Montana by Oakes, Payne and Rouse, as Receivers of the Northern Pacific *Railroad* Company, which was a federal corporation, the said Receivers being appointed moreover by a decree of the federal court. (Transcript, p. 1 to 15. p. 27 to 31).

The suit proceeded in the Circuit Court in the name of said Receivers to a hearing on demurrer and to a submission of the case upon bill, answer and stipulated facts. (Transcript, p. 34 to 54.) On the twelfth of November, 1896, it was stipulated and represented to the Court that the Northern Pacific *Railway* Company had purchased the property in question pending the litigation, and it was agreed and thereupon ordered by the Court that the Northern Pacific *Railway* Company be substituted as plaintiff in place of the Receivers. Thereupon a decree was passed on the sixteenth day of December in favor of the complainant enjoining the enforcement and collection of the taxes. From this decree the defendant William Myers, County Treasurer, appealed to the Circuit Court of Appeals which reversed the decree of the Circut Court. *Myers* vs. *Northern P. Ry. Co.*, 48 U. S. A. 620. The plaintiff Railway Company takes this appeal.

It thus appears that the jurisdiction of the Circuit Court over this case rested, not on citizenship, but on the federal question involved. The Circuit Court of Appeals' act of March 3, 1891, Sec. 6, provides that the judgments or decrees of the Circuit Court of Appeals shall be final in all cases, in which the jurisdiction of the Circut Court is dependent entirely upon the opposite parties to the suit or controversy being aliens and citizens of the United States, or citizens of different states. Therefore this is not one of the cases in which the jurisdiction of the Circuit Court of Appeals is final. The transfer of title pending the suit did not affect the jurisdiction of the Circuit Court which had already attached. *Mollan* vs. *Torrance*, 9 Wheat. 537; *Dunn* vs. *Clarke*, 8 Pet. 1; *Morgan* vs. *Morgan*, 2 Wheat. 290; *Conolly* vs. *Taylor*, 2 Pet. 556; *Clarke* vs. *Mathewson*, 12 Pet. 164; *Whyte* vs. *Gibbes*, 20 How. 541; *Judge Curtis on Federal Jurisdiction*. p. 121. The jurisdiction of this court, depending on the character of the jurisdiction of the Circuit Court, cannot consequently be affected by a transfer of interest pending litigation after the jurisdiction of the Circuit Court had once attached on the ground of a federal question.

The case as before stated, was determined in the

Circuit Court on the pleadings and an agreed statement of facts. The agreed statement contains all the essential facts and is printed in the transcript, p. 54 to 67.

The Northern Pacific grant did not pass mineral lands to the Company. Sec. 3 of the Act of July 2, 1864, incorporating the Northern Pacific Railroad Company, grants to said company, its successors and assigns, "every alternate section of public land, *not mineral*, designated by odd numbers, to the amount of twenty alternate sections per mile, on each side of said railroad line," etc.

This section also contains the following proviso:

> "*Provided further*, that all mineral lands be, and the same are hereby, excluded from the operations of this act, and in lieu thereof a like quantity of unoccupied and unappropriated agricultural lands in odd numbered sections nearest to the line of said road, may be selected as above provided; and *Provided, further*, that the word 'mineral' when it occurs in this act, shall not be held to include iron or coal."

It is to be noted in passing that mineral lands are not conveyed by the grant any more than even sections are conveyed.

The lands described in the complaint lie within the place limits of the grant within the state of Montana. The railroad was located and constructed opposite these lands prior to the year 1888. That portion of the road opposite the lands in question was definitely located prior to July 6, 1882. (Transcript, p. 56.)

At the date of the grant and at the date of definite location the lands in question were not reserved, sold, granted or otherwise appropriated, and there were no filings or entries in the Land Office standing against the same. They were surveyed prior to the assessment complained of and were returned in the surveys as non-mineral in character. (Transcript, p. 56, 57.)

The Land Commissioner of the Railroad Company in January, 1887, filed the usual application in the local land office claiming the lands described in the complaint for the Company, and in 1892 the local land office approved

the list and forwarded it to the Commissionerof the General Land Office. (Transcript, p. 57.)

In the usual course such lists are, upon their receipt in the office of the Commissioner of the General Land Office, transmitted to the railroad division to be examined, for the purpose of determining whether they are within the limits of the grant and whether the conditions of the grant have been complied with by the Railroad Company. They are thereafter transmitted to the different divisions, including the mineral land division, for determination as to whether they fall within exceptions from the grant. After the lands which pass under the grant are so ascertained and all exceptions eliminated, a clear list is made and approved by the Commissioner of the General Land Office and certified to the Secretary of the Interior for his approval. Such lands are not patented to the Company until such clear lists are approved by the Secretary. The lists, including the lands in question, had not at the time of the assessment complained of and had not at the time of the commencement of this suit, been adjusted in the office of the Commissioner of the General Land Office. The various divisions of that office had not, when the suit was commenced, examined and passed upon said list or determined what lands were within the grant to the Company and what were not. None of said lands had been certified by the Commissioner to the Secretary of the Interior as being lands passing under the grant, and none of them had been patented. (Transcript, p. 58, 59.)

The Railroad Company had no interest in or title to the lands except as conferred by said grant. (Transcript, p. 59.)

On November 4, 1889, Secretary Noble suspended the patenting of lands in Montana to the Northern Pacific Company "until the mineral or non-mineral character of the lands selected by said company had been investigated and definitely ascertained and adjudicated by proper proceedings." (Transcript, p. 59, 60.)

The taxes complained of were assessed in the year

1894, and Secretary Noble's order of suspension was not revoked prior to 1895. (Transcript, p. 60.)

The Railroad Company and the Receivers thereof have been at all times diligent and active in obtaining the adjustment of the grant, and the non-identification of lands coming under the grant is in no way due to its, or their action, or non-action. (Transcript, p. 60.)

Under the Act of Congress of February 26, 1895, Stats. at Large, Vol. 28, p. 683, three commissioners have been appointed to examine and classify the mineral lands in the Helena land district including the lands described in the complaint. The question whether said lands are mineral or non-mineral in character is now under investigation under the terms and provisions of said Act. (Transcript, p. 59, 60.)

The commissioners commenced examination and classification in the Helena district during the year 1895 and have since continued. The commissioners have examined and classified a portion of the lands described in the complaint. None of them had been classified or examined at the time the taxes were assessed. Of the lands classified by the commissioners up to the date of the stipulation of facts about twenty per cent have been determined to be mineral. The larger part of the land has not been examined and classified. A few of the lands were involved in contests between the Company and mineral claimants pending before the Interior Department. None of the contests had been decided when the taxes were assessed. Some of them had been decided when the facts were stipulated and the balance were still undetermined and pending. (Transcript, 60 to 64.)

In the year 1894 the assessor of Jefferson county, Montana, the appellee's predecessor in office, assessed the lands described in the complaint in the manner and form required by the Montana law, and the assessment roll is included in the record marked Exhibit "X" attached to the stipulation of facts and printed in this court under the title "Stipulation and Addition to Record." The Assessment roll is in the following form:

Railroad Co., Northern Pacific, St. Paul, Minn.

| Description. | Sec. | Town. N. | Range. E. | Area. Acres. | Val. |
|---|---|---|---|---|---|
| N. W. ¼ and lots 1, 2, 5, | 5 | 1 | 1 | 268.88 | 537 |

(Transcript, p. 65, 67, and "Stipulation and Addition to Record.")

---

## ASSIGNMENT OF ERRORS.

The errors are assigned in the record (Transcript, p. 86, 87.) The assignments may be summed up under two propositions:

1. *The lands in question were not subject to assessment or taxation under the laws of Montana in the year 1895.*

2. *The particular assessment here complained of was at least illegal and should be enjoined.*

## ARGUMENT.

The question for decision is not whether the Railway Company has any interest in its grant, or in the lands in question, which may be subjected to some form of taxation; but whether the *lands themselves* are taxable: whether the present assessment which is on the lands themselves can be sustained. We may well concede that the taxing power is broad enough to reach in some form the interest of the Railway Company in its grant. That interest becomes confessedly a vested interest upon construction of the road. It then becomes property and may well be held subject to someform of taxation.

But here the legislature authorizes a tax upon, and the assessor makes an assessment upon, the land itself by specific description: the whole legal title to each parcel being specifically and separately assessed. When the plain fact is, that neither the assessor, or the Railway Company can place its hand on a single specific parcel and say whether it belongs to the company or to the United States.

The assessment is justified by the assertion that the grant is one *in praesenti:* a misleading expression. The grant is as much *in praesenti* before the public surveys as after; yet it is universally admitted that the lands are not taxable before survey. So the grant is one *in praesenti* before the road is built: yet the lands could not be taxed. A present grant giving a right to earn or receive land might be taxable as property before the road was built, or after it was built before the surveys. But the inquiry before us is, whether any specific land is identified before patent as coming under the grant, so that the company has a complete legal or equitable title to that particular land which brings the land itself under the taxing power.

When we say that a grant is in present words and operates as of its date, it is not meant that the specific sections which will pass under the grant are ascertained. All that is meant is that whatever shall be determined to pass under the grant passes as of its date, usually by relation. As this court well said of the grant in question in *St. Paul & Pacific Railroad Co.* vs. *Northern Pacific Railroad Co.*, 139 U. S. 1. 5

> "As seen by the terms of the third section of the act the grant is one *in praesenti:* that is it purports to pass a present title to the lands designated by the alternate sections, subject to such exceptions and reservations as may arise from sale, grant, pre-emptiom, or other disposition previous to the time the definite route of the road is fixed * * * * The route not being at the time determined, the grant was in the nature of a float, and the title did not attach to any specific sections until they were capable of identification; but when once identified the title attached to them as of the date of the grant, except as to such sections as were specifically reserved. It is in this sense that the grant is termed one *in praesenti;* that is to say it is of that character as to all lands within the terms of the grant, and not reserved from it at the time of the definite location of the road."

So this court said in the case of *Barden* vs. *Northern Pacific Railroad Company*, 154 U. S. 288, 313-316;

> "It is also true that the grant was one *in*

*praesenti* of lands to be afterwards located. From the immense territory from which the sections were to be taken, it could not be known where they would fall until the line of the road was established; then the grant attached to them, subject to certain specified exceptions; that is, the sections, or parts of sections, which had been previously granted, sold, reserved, occupied by homestead settlers, or pre-empted or otherwise disposed of, were excepted, and the title of its other sections or parts of sections attached as of the date of the grant so as to cut off intervening claimants. In that sense the grant was a present one. But it was still, as such grant, subject to the exception of mineral lands made at its date or then excluded therefrom by conditions annexed. Whatever the location of the sections, and whatever the exceptions then arising, there remained that original exception declared in the creation of the grant * * * * The cases cited in support of the claim of the plaintiff only show that the identification of the sections granted and of the exceptions therefrom of parcels of land previously disposed of, leaves the title of the remaining sections or parts thereof, to attach as of the date of the grant, but has absolutely no other effect. Such is the purport, and the sole purport of the cases of *St. Paul and Pacific Railroad Company* vs. *Northern Pacific Company*, 139 U. S. 1, 5, and *Deseret Salt Company* vs. *Tarpey*, 142 U. S. 241, 247, cited by the plaintiff * * * After the plaintiff had complied with all the conditions of the grant, performed every duty respecting it, and among other things that of definitely fixing the line of the route, its grant was still limited to odd sections which were not mineral at the time of the grant, and also to those which were not reserved, sold granted, or otherwise appropriated, and were free from pre-emption and other claims or rights at the time the line of the road was definitely fixed, and was coupled with the condition that all mineral lands were excluded from its operation, and that, in lieu thereof, a like quantity of unoccupied and unappropriated, agricultural lands, in odd sections, nearest to the line of the road, might be selected.

There is, in our judgment, a fundamental mistake made by the plaintiff in the consideration of

> the grant. Mineral lands were not conveyed, but by the grant itself and the subsequent resolution of Congress cited were specifically reserved to the United States and excepted from the operations of the grant."

Applied to lands not granted at all it is absurd to call the grant one *in praesenti*. It cannot be successfully contended that the grant passes a title to mineral land, subject to be devested by subsequent discovery of mineral. By the plain terms of the act mineral land is not "granted." It is excepted and "excluded from the operations of this act." Mineral lands are no more granted than are even sections, or lands outside the lateral limits of the grant.

The question here is not whether the Railway Company may not have *some* right, or some "possessory claim" which may be taxed; but whether the status of the particular sections in question is so determined before patent that they can be said to belong to the company; whether it can be said that the company owns these particular sections and not the United States. Such part of the lands as are mineral belongs to the United States and will never pass under the grant. It cannot be disputed that a large proportion of the lands is mineral, and what proportion, or what lands, is absolutely incapable of determination until the Government of the United States determines the question according to the acts of Congress. That time has not yet arrived, and as to any piece of land involved in this suit it could not be determined when the assessment was made and, as to most of it, cannot now be determined whether it is mineral or non-mineral; whether it belongs to the United States or will come to the Railway Company.

The company has no power to make this determination. The record is conclusive that the company and its receivers have done everything within their power to secure the determination and to speed it. The sole right to make such determination, and to find the facts which are preliminary and essential to such decision, is in the United States; and the United States has the sole do-

minion over said lands for the time being until those lands, which are agricultural and which belong to the company, are segregated from the mass.

The case of *Barden* vs. *Northern Pacific Railroad Company*, 154 U. S. 288, opinion of the court, pp. 313 and 314, settles not only that mineral lands are excluded from the operation of the grant and do not pass, but that any land upon which mineral is discovered prior to the patent is excluded from the grant, and that the patent is necessary to identify what lands are within the grant and what outside of it. Until such identification the lands constitute a mass, partly belonging to the United States, partly to come eventually to the Railroad Company, but what particular lands belong to the United States and what will come to the Railroad Company cannot be determined. So long as this condition continues the government has not parted with possession of and dominion over the lands; they are still essentially government lands and are not subject to taxation. They are analogous as to taxability to uncertified indemnity lands, which a railway company may have a vested right to receive, but which are not taxable until identified and patented, and fall fairly within the principles decided in *Wisconsin Central Railroad Company* vs. *Price County*, 133 U. S. 496; *Northern Pacific Railroad Company* vs. *Traill County*, 115 U. S. 600.

Until determination of the character of the land and patent the Railroad Company is excluded by law from possession of, or dominion over it. It cannot sell and make good title to an acre; it cannot cut the timber upon it; it cannot raise crops upon it; it cannot make any valuable use of it. The lands in question lie in a mineral country and there is no doubt that a large proportion of the lands assessed will never come to the company. Neither the tax officer nor the Company can determine which are mineral and which are not. Both legally and for all practical purposes the Company has no title.

The proposition that while in this condition the lands were not taxable is not new. It was distinctly stated by Mr. Justice Brewer in the dissenting opinion

in the Barden case (concurred in by Mr. Justice Gray and Mr. Justice Shiras), on p. 340;

> "By the rule now laid down, the title to no one of these twenty sections passes to the company, because it is not known absolutely which are mineral lands. So far as known, none may be mineral, and yet, as in this case before us, six years after that line of definite location an exploration develops the fact of minerals, and then it was declared that the title did not pass. When you simply say, as the court does in this opinion, that out of those twenty sections there shall pass the title to such lands as shall thereafter be found or be determined by the Secretary of the Interior to be non-mineral lands, you say in effect that there is no identification of a single tract."

Again on page 347:

> "Again, it is abundantly well settled that lands the title to which remain in the government are not subject to taxation. Can it be that Congress contemplated that the territories and states which should be organized along the line of this transcontinental highway should not be able to tax any alternate sections within the place limits of this grant until such time as it should appropriate money for an exploration as to their character? * * * * Will it be said that Congress intended that the Northern Pacific should pay the taxes on all the lands so situated, taking the chances in the future of some of them proving to be non-mineral? Would such injustice be imputed to Congress, even as against a corporation? Suppose the Northern Pacific did not pay and some party purchased the land at a tax sale; has he lost his money because the land now proves to be mineral lands, and, therefore, still the property of the government? Or, if the State is under obligation to refund the money thus improperly collected in the way of taxes, what then results? The State or County has regulated its tax levy and its expenditures upon the supposition that these lands were subject to taxation. If the title has not passed from the government they are not taxable and a new burden must be cast upon the property of individuals within the territorial limits to make good the unexpected deficiency of public funds."

Here is a distinct statement, if we understand it, made by the three dissenting judges in the Barden case, that under the opinion of the majority of the court the lands were not subject to taxation by the various states until the mineral lands were segregated and the agricultural lands in some way identified. There is nothing in the opinion of the majority of the court from which it can be inferred that the court was not agreed upon this proposition. On the contrary it would appear from the opinion of the court that the full legal title to the lands was not subject to such taxation, as would by sale thereunder pass the land itself, the court drawing the very distinction we insist on by saying, p. 324-5;

> "So also it is said that the States and Territories through which the road passes would not be able to *tax the property of the company, unless they could tax the whole property, minerals as well as lands.* We do not see why not. *The authority to tax the property granted to the company did not give authority to tax the minerals which were not granted. The property could be appraised without including any consideration of the minerals. The value of the property excluding the minerals could be as well estimated as its value including them. The property could be taxed for its value to the extent of the title which is of the land.*"

But since the *Barden* case the court has decided the case of *Central Pacific Railroad Company* vs. *Nevada*, 162 U. S. 512, and this decision is the principal reliance of the learned Attorney General, for the proposition that lands are taxable. It becomes necessary to analyze that case somewhat closely. When this is done we are confident it will appear that this case and the Nevada case are broadly distinguishable from each other. In the Nevada case the statute provided (Sec. 1088) that it should be the duty of the assessor to prepare a roll stating "all real estate, including the ownership, or claim to, or possession of, or right of possession, to any land," etc. The form of the assessment in that case is given in Mr. Peckham's brief and shows an assessment of the company's possessory claim to a certain number of acres of land. The Nevada statute provided for the taxation of the two separate interests in real estate, viz: (a) the

whole estate under the description "real estate," and (b) a less estate or interest under the description "possessory claim."

Turning to the Montana statutes and the assessment made thereunder, the distinction between this tax and the one passed upon in *Central Pacific Railroad Company* vs. *Nevada* is made apparent. The Montana statute will be found in laws of Montana, Second Session 1891, p. 75. The law contains the following sections which are pertinent to the inquiry:

Sec. 4. First. The term "*property*" includes moneys, credits, bonds, stock, franchises, and all other matters and things, real, personal and mixed, capable of private ownership * * * *

Second. The term "real estate" as used in this act, includes all mineral and agricultural land of every description, upon which final proof and payment have been made.

Sec. 5. All taxable property must be assessed at its full cash value. Land and the improvements thereon must be separately assessed.

Sec. 12. * * * * Land must be assessed in parcels or sub-divisions not exceeding six hundred and forty acres each, and tracts of land containing more than six hundred and forty acres, which have been sectionized by the United States Government, must be assessed by sections or fractions of sections.

The assessor must set aside one line in the assessment book for the description of each six hundred and forty acres of land or less—the number of acres to be entered in one column, the description in another column, value in another column, value of improvements in another column, and the total in the total column.

Sec. 14, sub-division 5, referring to statement under oath to be made by tax payer:

"An exact description of all lands in parcels or sub-divisions, not exceeding six hundred and forty acres each, and the sections and fractional sections of all tracts of lands containing more than six hundred and forty acres which have been sectionized by the United States government."

Sec. 34, providing the form of the assessment book, sub-division 2.

"Land, by township, range, section or fractional section; and when such land is not a United States land division or subdivision, by metes and bounds, or other description sufficient to identify it, giving an estimate of the number of acres (not exceeding in each and every tract 640 acres), locality and the improvements thereon.

Sec. 83. "Every tax due upon real property is a lien against the property assessed; and every tax due upon improvements upon real estate assessed to other than the owner of the real estate is a lien upon the improvements; which several liens attach as of the first Monday of February of each year."

The assessment roll printed in "Stipulation and Additions to Record" purports to be an assessment upon specific and distinct land, not upon the mere right, title or interest, or upon the possessory or other claim of the Northern Pacific Railroad Company. The stipualtion of facts which constitutes the record in this case says: "That in the year 1894 the assessor of Jefferson County, Montana, proceeded to and did assess the *lands described in the complaint* herein in the manner and form prescribed by law, and included *said lands* in the assessment book of said county of Jefferson for said year."

Unlike the statute of Nevada, the statute of Montana contains no provision for the assessment of possessory or other claims, but every provision of the statute looks to the assessment of the land itself. Unlike the assessment roll in the Nevada case, the assessment roll here shows an assessment on the land itself, not upon the right, title, interest or claim of the Railroad Company only.

It will thus be seen that the Nevada case involved a taxation of the company's interest in its grant, whatever that interest might be, while in this case the assessment is against distinct parcels of land as such. That case came to this Court on writ of error from the highest court in Nevada, and the state court had held that the interest of the company was such an interest as was included under the assessment of "possessory claim." The Railroad Company argued that its interest was not a "possessory claim," but this court said (p. 522)

that this was not a federal question; that the state court having held that the statute of the state and the assessment included such a claim as the company had in its unpatented grant, that decision was binding on the federal court and no federal question was thereby raised.

In answer to the argument based on the mineral character of part of the lands the court said (p. 525):

> "But, if the Railroad has a possessory claim to these lands, they are taxable under the statute of Nevada, and it is this and this only which the state has assumed to tax."

This sentence quoted from the opinion points the distinction clearly. If land is government land and a state chooses to tax the possessory interest of John Smith therein, we do not see that any valid objection could be made to such an assessment. All that would pass by sale thereunder would be the interest of John Smith; such interest as he might have; and the title of the land would not be clouded by the sale. Such an assessment does not pretend to affect the title. But on the other hand it is equally clear and well settled that the taxation by the state of government *land* is inoperative and void. Such a tax must be valid, or void when assessed: it cannot be held valid, or void depending on some future event. But if valid when assessed it will carry a good title to mineral land—that is to the land of the United States.

This distinction explains the language of the court on page 526 of the *Nevada case* in which it speaks of the grant as a grant *in praesenti* of lands to be afterwards located. What the court meant was that the grant was taxable; the right of the company to receive lands was taxable; the claim of the company was taxable; and that was all which the state of Nevada had assumed to tax. Here the taxation is of the lands themselves while they are in a conglomerate mass, within the dominion and control of the government, with the exclusive right in the government to make the segregation and before that segregation is made and the essential facts necessary to segregation have been determined.

If this argument were otherwise doubtful, it is much

strengthened when the act of February 26, 1895, is considered in connection with it. It being necessary and the government having reserved the right to segregate the mineral from the non-mineral lands falling within the general limits of the grant, Congress had an undoubted right to pass any legislation, or take any action, for the purpose of defining what lands were in fact agricultural belonging to the Railroad Company. With this in view Congress passed the act in question. The act established courts in the land district of Bozeman, Helena and Missoula, in Montana, and the Coeur d'Alene district in Idaho. These courts were authorized to examine the lands within the Northern Pacific limits in these districts, take the testimony of witnesses and receive other evidence relating to the character thereof, summon witnesses and administer oaths; to classify the lands as mineral or non-mineral by legal subdivisions. Their decisions are subject to appeal and are final when approved by the Secretary of the Interior. The Railroad Company under section 7 is to receive patents for such land only, as is so determined to be non-mineral and no patents can issue before such determination.

The United States by this act distinctly asserted its right to the possession of these lands as government lands pending their segregation. It took possession of them and established its own tribunal with jurisdiction to make the separation, and directed patents to the Railroad Company of agricultural lands, *only* as and when the classification was completed.

Therefore the situation when these taxes were assessed was this: the government had granted to the Railroad Company certain lands out of a larger mass belonging to the government, the power to select and segregate the granted lands out of the whole mass being reserved to the United States. Suppose A grants to B all the land fit for agriculture in a certain section, A reserving the exclusive right to determine for himself what lands in that section are fit for agriculture. Now, in this condition, the title to no particular land is vested in B; B has a vested right to receive some land. This right may

be the subject of taxation in some form, but no specific land is vested in B. We submit it is a clear proposition that neither the section nor any specific acre in it can be taxed as the land of B. The situation is, in principle, precisely like the right of the Railroad Company to receive indemnity lands before the selections and patents are made. Such indemnity lands were held not to be taxable in the case of *Wisconsin Central Railroad Company* vs. *Price County*, above cited.

The Northern Pacific Campany desires to pay all the taxes to which it is justly subject, but consider the equity of putting the company in a position where it must, in order to protect what will some day belong to it, pay taxes on a large amount of land to which it will never obtain title; such taxes when paid could not be recovered back. Can it be said that Congress intended the Northern Pacific to pay taxes on all these lands pending their segregation, in order to protect that part of them, which are decided eventually to be agricultural? Will such injustice be imputed to Congress? Is it to be supposed that Congress intended to cloud the title of such lands as should turn out to be mineral by tax titles and tax deeds, or that the state and county should regulate their tax levies and expenditures, upon the supposition that these lands are subject to taxation, and then have it turn out that a large proportion of the taxation is void? As it cannot now be determined which of the lands are agricultural, the company clearly must, if the lands are taxable, pay upon all. This leaves the company to assume all the risk, leads to unnecessary expense on the part of the state, to the clouding of the title of the lands, to such uncertainty of title as may for years prevent their occupation and improvement, and to a multiplicity of suits. This is clearly a sufficient ground for injunction.

The decisions are numerous which point the distinction we have endeavored to make between the taxation of the *land* and taxation of some person's interest therein or claim thereto.

*People* vs. *Crockett*, 33 Cal. 150, was a case where

Teodora Soto was granted three square leagues of land by the Mexican government, to be selected by the *grantee* and her assigns out of a tract, which was shown to contain more land than the amount granted. The case was one where the grantee had a complete equitable title and the land was held to be taxable, Currey, C. J., dissenting. The statute of California is quoted on page 155.

> "The term, 'real estate,' whenever used in this act, shall be deemed and taken to mean and include, and it is hereby declared to mean and include, the ownership of or claim to * * * any land within the state * * * and the claim by * * * any person * * * to any land, shall be listed under the head of real estate."

In *People* vs. *Shearer*, 30 Cal. 655, the court held in regard to the public domain of the United States, that the land itself is clearly not taxable; but that where the land is in actual occupation and enjoyment of any person, as for instance under a pre-emption, the interest of the possessor is taxable, the possession being a species of property.

In *People* vs. *Cohen*, 31 Cal. 210, the assessment was upon "claim to and possession of 609 acres of land in Suscol Valley, described as follows." The land was public land, but the court held that the assessment in question, not covering the land itself, but only the defendant's claim and right of possession, was valid.

*State* vs. *Central Pacific Railway Company*, 25 Pac. Rep. 442, decided by the Supreme Court of Nevada, involved a taxation of unsurveyed lands. The assessment was of all the odd-section of land "as their designation will appear when the surveys of the government are extended over them." This was held not to be an assessment of a possessory interest or claim under the Nevada statute and void.

In *State* vs. *Central Pacific Railroad Company*, Supreme Court of Nevada, 30 Pac. Rep. 686, the court drew very clearly the distinction between taxation of a claim or interest in real estate and taxation of the land itself. With reference to the assessment in that case the court said:

> "It will be noticed that it is only the possessory claim to this land that is assessed. Whatever may be the meaning of this term 'possessory claim' * * * it is evident that the thing attempted to be taxed is something less than the fee. * * * Against such an assessment, whatever may be said of its validity otherwise, no objection could ever have been made upon the ground that it was an attempt to subject the property of the United States to taxation. Nothing but the defendant's interest in the land can be reached by such an assessment. It cannot possibly affect the government title or lien any more than a voluntary sale by the defendant would do so."

The learned Circuit Court of Appeals says in its opinion, "There is no averment, however, in. the bill that any of such lands are mineral lands," And the court follows this statement with the quotation of a portion of paragraph III of the bill, shown on page 4 of the printed transcript, to the effect that the surveyors reported the lands to be agricultural and so far as the plaintiff had information no minerals had yet been discovered in said lands. In the statement that the bill does not aver any of said lands to be mineral the court was mistaken; the quotation from the bill is only a portion of the averments on that subject. The following averment of the bill seems to have escaped the attention of the court:

> "And your orators believe and aver that some portions of the lands described in the schedule hereunto annexed will, when examined and classified as provided for in said act of Congress, be held and determined to be mineral lands, and excluded from the grant to said Northern Pacific Railroad Company, and that some of said lands will be held and determined to be agricultural lands, and to be within the grant to said company, but your orators do not know and cannot show unto your honors what specific lands will be so classified and determined to be mineral lands, and your orators further show that pending the classification of said lands as provided for in said bill your orators have refused, and are refusing, to sell or dispose of said lands or any thereof. That until such examination and classification is completed and made final your

orators cannot ascertain or know what part of said lands are granted, and what part thereof are mineral lands and excluded from said grant to said Northern Pacific Railroad Company." (Transcript pp. 7 and 8.)

The fact when the bill was filed was that none of the lands had been classified as mineral or non-mineral by the Mineral Land Commission. But the stipulation of facts shows (Transcript p. 60-64) that prior to the submission of the case in the Circuit Court, the Mineral Land Commission had classified a considerable portion as mineral, another considerable portion as non-mineral and had not yet concluded its labors, the remainder of the lands remaining unclassified. At that date about twenty per cent. of the lands passed upon had been found to be mineral and to belong to the United States. If this assessment is valid how can the conclusion be avoided that sale under it will pass title to the mineral lands?

C. W. BUNN,
Of Counsel for Appellant.